Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Petition of BellSouth Telecommunications, Inc. For Forbearance Under 47 U.S.C. § 160(c) From Application of Computer Inquiry and Title II Common-Carriage Requirements	)	WC Docket No. 04-405

COMMENTS OF

NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS;
NATIONAL LEAGUE OF CITIES;
U.S. CONFERENCE OF MAYORS;
TEXAS COALITION OF CITIES FOR UTILITY ISSUES;
GREATER METRO TELECOMMUNICATIONS CONSORTIUM;
METROPOLITAN AREA COMMUNICATIONS COMMISSION;
MT. HOOD CABLE REGULATORY COMMISSION;
CITY OF EUGENE, OREGON;
AND
MONTGOMERY COUNTY, MARYLAND
(THE "LOCAL GOVERNMENT COALITION")

Nicholas P. Miller
Matthew C. Ames
Gerard Lavery Lederer
Miller & Van Eaton, P.L.L.C.
Suite 1000
1155 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 785-0600

Attorneys for the Local Government Coalition

December 20, 2004

SUMMARY

The Local Government Coalition opposes the Petition for Forbearance of BellSouth ("the "Petition"). The Petition is premature, the statutory conditions for forbearance are not met, and deregulation of BellSouth's broadband transmission facilities is exactly the wrong response to current market conditions. Granting the relief sought in the Petition would merely entrench the existing cable-telco duopoly and undermine long-standing Congressional policies designed to protect the public interest. Instead of relieving BellSouth of all of its existing *Computer Inquiry* and Title II obligations, the Commission should regulate the "facilities" layer for all types of providers, as proposed by MCI and other parties in the IP-Enabled Services proceeding, and adopt other rules consistent with the principles proposed by the Local Government Coalition in that proceeding.

Such pending matters as the Cable Modem, Wireline Broadband, and IP-Enabled Services proceedings, as well as *NCTA and FCC et al. v. Brand X Internet Services*, must be decided before BellSouth's argument can be considered. By the time those matters have been resolved, the law, the facts, and the views of interested parties will probably have changed. Consequently, the Petition should be denied as premature.

Furthermore, the Petition is based on four key premises, all of which are false. First, although cable modem service may dominate the residential market, it does not dominate the business market. Second, BellSouth has market power, in both business and residential markets, because of its size, ubiquitous facilities, existing subscriber base, and other factors. The broadband market in any given community today will typically be a duopoly made up of the local cable operator and the local incumbent LEC. This will remain the case for the foreseeable future. Third, so-called "intermodal" competition does not really exist, because satellite,

wireless, and other technologies currently have less than 8% of the combined market, and technological factors limit their growth potential. Fourth, the Commission has taken no action yet to deregulate the cable industry, and even if the Commission were to refrain from imposing any federal regulation, the facilities of cable operators remain subject to local franchising requirements.

Section 10 of the Communications Act did not give the Commission the power to sweep away all of Title II on the basis of general claims about the state of competition. The statute requires an individual review of specifically-identified requirements, whereas BellSouth asks for relief from broad classes of regulations, without analyzing or even identifying many of the specific obligations at issue. The Commission has no power to act on such an ill-defined and poorly-supported request. Furthermore, none of the three statutory conditions for forbearance has been met. *Computer Inquiry* and Title II requirements must remain in place to ensure just and reasonable rates and to prevent unjust or unreasonable discrimination, because market forces are not sufficient to restrain duopolies. For the same reason, some level of regulation is required to protect consumers. Forbearance would also sweep away long-standing obligations designed to protect the public interest, such as CALEA compliance, service for the hearing and speech impaired, universal service, and E-911, among others.

Rather than give BellSouth a free ride, the proper policy would be to put all providers on the same footing, by regulating the "facilities" layer, as proposed by MCI in the IP-Enabled Services Proceeding. In that proceeding, the Local Government Coalition included regulation of the facilities layer in its set of nine principles for guiding regulation in this area. The nine principles promote technological progress, while protecting the rights of facilities owners, state and local governments, and service providers. We urge the Commission to apply those

principles in the various pending proceedings related to broadband services and facilities. The Petition runs counter to those principles and should be denied.

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INTRODUCTION

These comments are filed on behalf of the following organizations and local governments, known collectively for purposes of this proceeding as the "Local Government Coalition:"

- the National Association of Telecommunications Officers and Advisors ("NATOA");
- the National League of Cities ("NLC");
- the U.S. Conference of Mayors ("USCM");
- the Texas Coalition of Cities For Utility Issues ("TCCFUI");
- the Greater Metro Telecommunications Consortium ("GMTC");
- the Mt. Hood Cable Regulatory Commission ("MHCRC");
- the City of Eugene, Oregon; and
- Montgomery County, Maryland.

NATOA's members include telecommunications and cable officers who are on the front lines of communications policy development in hundreds of local governments. NLC is the oldest and largest national organization representing municipal governments throughout the United States. Working in partnership with the 49 state municipal leagues, NLC serves as a resource to and an advocate for the more than 18,000 cities, villages, and towns it represents. The USCM is the official nonpartisan organization of the nation's 1,193 U.S. cities with populations of 30,000 or more. TCCFUI represents over 100 Texas cities in matters affecting the authority of local governments over rights-of-way and consumer protection. GMTC represents Denver and 29 other municipalities and counties in the Denver area, working together on telecommunications issues. MACC consists of 14 jurisdictions, in the Washington and Clackamas Counties of Oregon, and is responsible for overseeing cable franchises on behalf its members. MHCRC advocates for, and protects the public interest in, the regulation and development of cable communications systems in Multnomah County and the cities of Fairview, Graham, Portland, Troutdale and Wood Village, Oregon.

In a series of filings, local government interests have consistently advised the Commission that piecemeal attempts to deregulate broadband facilities would undermine important federal, state, and local government policies, and harm the public interest. The Coalition opposes BellSouth's Petition for Forbearance as yet another ill-considered proposal for circumventing the will of Congress. BellSouth would have the Commission eliminate a whole set of requirements governing its broadband facilities, including not only tariff requirements established by the Commission's *Computer Inquiry*,[1] but "all Title II common-carriage

[1] *See Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, Final Decision and Order, 28 F.C.C.2d 267 (1971);

requirements that might otherwise apply . . . ." Petition at 1. The Petition thus appears to call for the complete deregulation of BellSouth's broadband facilities. The Commission should not only deny the Petition, but take steps to adopt rules governing the facilities layer, so that all owners of facilities will be subject to uniform requirements designed to advance meaningful competition, on an economically sound basis, while preserving fundamental social policies such as universal service and E-911.

I. THE PETITION IS PREMATURE.

For over three years, the Commission has been developing a policy for dealing with broadband networks and services delivered over such networks. There are many proceedings pending at the Commission that might bear in some way on the relief requested by BellSouth. These include, among others:

- *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Notice of Proposed Rulemaking, CS Docket 02-52, 17 FCC Rcd 4798 ("*Cable Modem NPRM*");
- *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, Universal Service Obligations of Broadband Providers*, Notice of Proposed Rulemaking, CC Docket Nos. 02-33, 95-20, 98-10, 17 FCC Rcd 3019 (2002) ("*Wireline Broadband NPRM*").
- *In the Matter of IP-Enabled Services*, Notice of Proposed Rulemaking, WC Docket No. 04-36, 19 FCC Rcd 4863 (2004) ("*IP-Enabled Services NPRM*").

None of these proceedings has concluded. While interested parties can speculate about what the regulatory structure for broadband facilities and services to be adopted by the Commission will ultimately look like, speculate is all they can do for now. The Supreme Court's decision in

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Amendment of Section 64.702 of the Commission's Rules and Regulations, Final Decision, 77 F.C.C. 2d 384 (1980); *Computer III Further Remand Proceedings: Bell Operating Co. Provision of Enhanced Services; 1998 Biennial Review – Review of Computer III and ONA Safeguards and Requirements*, Report and Order, 14 FCC Rcd 4289 (1999).

NCTA and FCC et al. v. Brand X Internet Services[2] could have a profound effect on the scope of the Commission's regulatory choices. Regardless of how the Court decides that case, however, comments in response to the *Cable Modem NPRM*, the *Wireline Broadband NPRM* and the *IP-Enabled Services NPRM* all raise issues that must be resolved before the Commission can make a rational decision regarding the issues raised by the Petition. There is also the possibility of intervening Congressional action.

BellSouth essentially asks the Commission to remove fundamental elements of the existing regulatory scheme, before anybody knows what the new scheme will look like. It is inappropriate for the Commission to consider deregulation of BellSouth's broadband facilities until the Commission or Congress has developed a coherent model for dealing with all the new classes of services and facilities. Consequently, the Petition is premature.

In addition, it would make little sense for the Commission to merely defer action. By the time the Supreme Court, the Commission, or the Congress act, the relevant law is likely to have changed. The Petition itself may then be moot, in whole or in part, and key facts and circumstances will undoubtedly be different. Consequently, the relief sought and the views of other interested parties could also be quite different. If BellSouth were to conclude at that time that some form of forbearance were required, it could file a new petition that accurately reflected the new conditions. In the meantime, the Commission should dismiss the Petition.

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[2] Nos. 04-277, 04-281, *cert. granted*, ___ U.S. ____(2004) ("*Brand X*").

II. THE STATUTORY CONDITIONS FOR FORBEARANCE ARE NOT MET.

A. Section 10 Does Not Authorize the Commission To Legislate Under the Guise of Forbearance.

Reduced to its essence, BellSouth's argument is that, because the Commission has not regulated cable modem service, the Commission must deregulate BellSouth's broadband facilities. The chief problem with this argument is that it overreaches. Congress never intended Section 10 to be used to completely restructure an industry sector. The Commission may be able to do a lot of things under Section 10, under Section 706, and under its ancillary authority. But fundamental decisions about the structure of the communications industry remain the responsibility of the Congress. No provision of the Communications Act gives the Commission unfettered authority to lift all restrictions on an incumbent LEC's broadband facilities with the wave of a hand, as BellSouth suggests.

In the 1996 Act, Congress was very concerned with constraining the market power of the incumbent LECs as they moved into new areas. Congress recognized that the Bell companies in particular would be formidable competitors, even in areas in which they were not already active, such as long distance service and video programming. The Bells were therefore permitted to move into long distance service only if they met the requirements of the competitive checklist.[3] And although common carriers were encouraged to move into the delivery of cable service as open video system operators, it was only subject to restrictions, such as the obligation to make capacity available to third parties on nondiscriminatory terms.[4] Congress did not specifically address the treatment of incumbent LEC broadband facilities, but this oversight does not

[3] 47 U.S.C. § 271.

[4] 47 U.S.C. §§ 651-653.

authorize the Commission to legislate in Congress's place.[5] It particularly does not authorize the Commission to deregulate one of the entities whose market power most concerned Congress at the very time it adopted Section 10.

Furthermore, to the extent that the Commission has any authority under Section 10 in this case, BellSouth's Petition is seriously deficient. Not only has BellSouth not established that the three conditions for forbearance specified by the statute have been met (as will be discussed further below), but BellSouth misconstrues how Section 10 is to be applied. The Petition makes sweeping statements about broad categories of regulations – the "Computer Inquiry requirements,"[6] "related Part 64 accounting requirements,"[7] and "all Title II common-carriage requirements"[8] – but engages in little or no analysis of the individual requirements themselves. In fact, with respect to "Title II common-carriage requirements" BellSouth fails to identify any of the specific statutes or rules supposedly at issue. This failure is fatal, both because it does not comply with the requirements of the statute, and because it makes nearly impossible for the Commission and interested parties to assess the consequences of forbearance.

Section 10 provides that:

> the Commission shall forbear from applying *any regulation* or *any provision* of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, . . . if the Commission determines that – (1) enforcement of such regulation or provision is not necessary [to ensure just, reasonable, and nondiscriminatory charges and practices]. . . (2) enforcement of *such regulation or provision* is not necessary for the protection of consumers; and (3)

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[5] Local governments have long argued that the Congress did address the treatment of broadband facilities when it amended the definition of "cable service" in 47 U.S.C. § 522(6). In rejecting this argument, the Commission has arguably excised from the Communications Act the Commission's own authority over broadband facilities.

[6] Petition at 1.

[7] *Id.*

[8] *Id.*

forbearance from applying *such provision or regulation* is consistent with the public interest.[9]

The statute speaks of forbearing from applying "any regulation" and "any provision" in the singular, if "such" regulation or provision (again in the singular) meets the conditions of the three subsections. Although the statute refers to obtaining relief with respect to "classes" of services or providers in the plural, it does not use the plural when referring to the provisions or regulations to be reviewed; the statute also does not refer to "classes" of regulations. Thus, the statute requires an individual analysis of each "such" provision. BellSouth's Petition does not undertake the required individual analysis; indeed, BellSouth has not even specifically identified many of the provisions from which it seeks to be relieved. Without conducting an individual assessment of each relevant provision, applying the standards in the statute, the Commission has no power to forbear. Furthermore, because the Petition addresses only generic groups of provisions in broad terms, BellSouth has given the Commission no specific evidence to support the individual analysis demanded by the statute.

Consequently, the Commission has no power to grant the Petition.

B. The Competitive Contours of the Broadband Market Do Not Justify Forbearance.

BellSouth's analysis rests on a handful of presumptions, selected and crafted to show that BellSouth is at a disadvantage in competing with the cable industry:

- Cable modem service dominates the broadband market;[10]
- ILECs have no market power in the area of broadband transmission;[11]
- There is significant intermodal competition from wireless, satellite and broadband-over-powerline providers; and[12]

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[9] 47 U.S.C. § 160(a) (emphasis added).

[10] Petition at 2-3, 9-10.

[11] *Id.* at 29.

- The Commission has tentatively concluded to forbear from applying Title II obligations to cable modem service.[13]

The Petition fails to conduct anything close to a satisfactory analysis of the relevant competitive conditions. In addition, the presumptions underlying the Petition are incorrect, misleading, and insufficient to support a claim for forbearance.

1. The Petition Does Not Include a Valid Analysis of the State of Competition.

A proper analysis of the state of competition in the broadband transmission market would address at least the following issues: identification of the product market, identification of the geographic market, identification of firms that participate in the relevant market, calculation of market shares for the participating firms, and barriers to entry. These issues are routinely considered by the Department of Justice, the Federal Trade Commission, and the Commission itself when assessing merger applications.[14] They are relevant in this context, because they offer a clear and accepted approach to assessing the degree of competition present in a market. We have not conducted a rigorous economic analysis ourselves, but only a brief discussion of these issues is needed to reveal the failings of the Petition.

Identification of the Product Market. The Petition does not clearly identify the product market. In fact, the Petition is ambiguous in at least two respects. First, it is not clear what BellSouth means by "broadband transmission services." BellSouth assumes that the services offered by cable operators, satellite and wireless providers, and putative broadband-over-

[12] *Id.* at 2, 10-13.

[13] *Id.* at 15.

[14] *See, e.g., Application of EchoStar Communications Corp. et al.*, Hearing Designation Order CS Docket NO. 01-348, 17 FCC Rcd 20559 (2002) ("*EchoStar Hearing Order*") at ¶¶105 – 150; Horizontal Merger Guidelines, issued by the U.S. Department of Justice and the Federal Trade Commission, April 2, 1992, revised April 8, 1997 ("*FTC Guidelines*").

powerline ("BPL") providers are all equivalent to whatever services it is providing that warrant forbearance. This is not at all clear, and BellSouth has submitted no facts to prove it. Second, the Petition does not distinguish between residential and business customers. The different characteristics of the residential and business markets for communications services are well known,[15] so it is incorrect to treat them as a single market. Both the nature of the product and the nature of the customers need to be identified before any of BellSouth's claims regarding the level of competition it faces can be addressed.

Identification of the Geographic Market. Similarly, BellSouth makes no attempt to identify the geographic market. BellSouth recites numbers of subscribers for different technologies at the national level, but this is not even close to sufficient. For one thing, BellSouth has not established that it offers service on a national level. At the very least, the Petition should have cited figures specific to BellSouth and its service territory. But even figures at the regional or state level would not be appropriate, because broadband transmission customers can only obtain service from companies operating in their particular communities. This is particularly important when addressing competition by the cable industry, because cable operators are franchised at the local level, and even after years of consolidation their service territories are not co-extensive with BellSouth's, even within individual metropolitan areas. Thus, BellSouth faces competition from different cable operators in different communities, and the individual characteristics of each of those operators – their size, the services they offer, and so on – could be relevant to the analysis. Furthermore, cable systems in rural areas and smaller

[15] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*"), at ¶¶ 44-54 (discussing enterprise market and mass market).

cities are often not as advanced as those in larger cities; thus, there may be areas in BellSouth's region that are not yet served by cable modem service.

Identification of Firms that Participate in the Relevant Market. A dependable analysis must take into account the actual firms that participate in each geographic market. The mere existence of different technologies – cable, DSL, satellite, wireless, and BPL – does not constitute competition. The fact that a certain technology has been deployed in one region of the country does not mean that it is available in another: multiple theoretical choices are of no benefit to a potential customer in Pensacola, for example, if no provider offering that choice is serving Pensacola. Furthermore, even if a given provider is present in a market, all consumers may not have access to that provider's services: if a cable operator's system has not been extended throughout a community, not very member of that community will have access to cable modem service. Assessing competition requires assessing the choices consumers actually have: what is required is an analysis of which specific companies are offering service in a given area.

Chairman Powell has stated that "Magic things happen when you have three competitors . . . ."[16] This may be true, in some markets. But competitors have to be competing for the same customers: if they are not in the same market, they are not really competitors. For example, if BPL offers lower quality service than FTTH, and so is relegated to high-cost areas where FTTH is not cost-effective, BPL will not actually be competing with FTTH. Treating BPL (or wireless or satellite) as a third competitor is wrong – indeed, arbitrary and capricious – if no subscriber actually has a third choice. Chairman Powell might more accurately have said "Magic things happen when consumers have at least three choices . . . ." But even then, each

[16] Larry Magid, *Something New Under the Sun*, CBSNews.com (July 15, 2004) (available at http://www.cbsnews.com/stories/2004/07/14/scitech/pcanswer/main629747.shtml).

market is different, and must be analyzed in light of its own conditions. This is why the multi-factor analysis suggested here, similar to the one used by the Commission in examining the EchoStar-DIRECTV merger, is more appropriate than broad rules of thumb.

Calculation of Market Shares for the Participating Firms. The Petition does not actually calculate or evaluate market shares, although it offers information regarding the numbers of subscribers using different technologies on a national basis. According to these figures, there are currently about 16.9 million cable modem subscribers, 11.3 million DSL subscribers, no more than 2 million fixed wireless subscribers, and just over 200,000 satellite subscribers.[17] Just taking these figures at face value suggests very strongly that there is no meaningful competition in the broadband market. Apparently, the cable industry serves 55.6% of all broadband subscribers, followed by DSL at 37.2%. Thus, the cable operator and telephone company serve 92.8% of the market: this suggests that the market is a duopoly and therefore not competitive. Indeed, the Commission has looked upon duopoly markets with disfavor in other contexts.[18]

Barriers to Entry. The Petition does not discuss barriers to entry at all, but barriers to entry in the market for broadband services are high. The capital cost of construction of wireline facilities is probably the single most important reason for the high degree of concentration in the sector. Furthermore, non-wireline competitors also face high entry costs of their own, as well as technological limitations that distinguish their capabilities from those of wireline providers.

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[17] Petition at 10-12.

[18] *Application for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner, Inc. and America Online, Inc., Petition of AOL Time Warner for Relief from the Condition Restricting Streaming Video AIHS*, Memorandum Opinion and Order, CS Docket No. 00-30, 18 FCC Rcd 16,835 (2003) at ¶ 12; *Amendment of the Commission's Space Station Licensing Rules and Policies*, First Report and Order, 18 FCC Rcd 10760 (2003) at ¶ 64.

Thus, as a general matter, it will be very difficult for new competitors of any kind to enter the sector.

Rather than present a valid economic analysis of the true contours of competition in the delivery of broadband transmission, BellSouth does little more than recite a few figures relating to national numbers of broadband service subscribers and identify technologies that might be able to offer comparable services. This level of analysis is too general to be of any value. BellSouth relies on the brief discussion of competition set forth in the *Triennial Review Order*, but in that decision the Commission was interpreting specific provisions of the Communications Act, and its findings were guided by the intent of Congress. Furthermore, while the Commission found that certain services were provided "in a competitive environment,"[19] it did not state that effective competition actually exists or that the market is fully competitive.

A more precise way to test BellSouth's claims about competition is to apply the Herfindahl-Hirschman Index ("HHI") of market concentration described in the *FTC Guidelines*. Of course, the Commission is familiar with this analysis. For example, the Commission calculated HHIs for a sample of relevant geographic markets as part of its analysis in the *EchoStar Hearing Order*.[20] A number of important court decisions have also discussed the use of the HHI as a measure of competition.[21]

One can look at the structure of the current market, as described by BellSouth, and ask whether the FTC would approve a hypothetical merger that would result in that structure. The FTC computes pre-merger and post-merger HHI's and draws certain inferences from the size of

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[19] *Triennial Review Order* at ¶ 292.

[20] *EchoStar Hearing Order* at ¶ 133-139.

[21] *See, e.g., FTC v. H.J. Heinz Co.*, 246 F.3d 708, 716 (D.C. Cir. 2001); *FTC v. PPG Indus.*, 798 F.2d 1500, 1502, 1503 (D.C. Cir. 1986); *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1081 (D.D.C. 1997).

the post-merger HHI and the difference between the pre- and post-merger figures. The HHI is computed by adding the squares of the percentage market shares of all the firms in market. Under the *FTC Guidelines*, a post-merger HHI greater than 1800 suggests that the market in question, after a proposed merger, would be highly concentrated. While this is not the only factor in determining whether a market is fully competitive, a high degree of concentration tends to reduce competition. We can calculate an HHI for a hypothetical three-firm market, using the national figures postulated by BellSouth in the Petition. According to BellSouth, the cable industry as a whole has 55.6% of the market, LECs serve 37.2%, and other competitors (satellite and wireless providers) have 7.2%.[22] For the sake of simplicity, treating this as a three-firm market yields an HHI of 3091 + 1383 + 52 = 4,526. Thus, the national market BellSouth describes is highly concentrated. Although this analysis alone does not address the need for regulation under these circumstances, the fact of high concentration supports the argument that the market is not competitive and therefore that some degree of regulation may be appropriate.

In addition, the *FTC Guidelines* state that mergers that result in increases of 100 points or more in the HHI in markets that are already highly concentrated "are likely to create or enhance market power or facilitate its exercise."[23] Thus, if we postulate a hypothetical merger that would lead to the current situation, we can develop an idea of whether the FTC would allow such a merger to occur. Let us assume a four-firm market, consisting of the existing cable industry (at 55.6%, as in the previous calculation), two DSL providers (at 18.6% each, or each half of the DSL provider in the previous example), and a fourth provider (at 7.2%, as in the previous example). This yields a pre-merger HHI of 3091 + 346 + 346 + 52 = 3835. The difference

[22] As noted above, BellSouth asserts that there are currently about 16.9 million cable modem subscribers, 11.3 million DSL subscribers, no more than 2 million fixed wireless subscribers, and just over 200,000 satellite subscribers. Petition at 10-12.

between this pre-merger HHI of 3835, and the post-merger HHI computed above, is nearly 700, well above the 100 points that triggers the FTC's concern. Consequently, although the current duopoly is preferable to a monopoly, the present market structure is by no means fully competitive.

2. *BellSouth's Justification for Forbearance is Fundamentally Wrong.*

Even taken on its own terms, the Petition should be denied because its claims regarding the state of competition and regulation are based on false premises.

Cable Operators Do Not Necessarily Dominate the Market. We stipulate for purposes of these comments that cable modem service may dominate the residential broadband market, when viewed from a national perspective. But BellSouth does not ask for relief merely with respect to its facilities serving the residential market: the Petition applies to all of BellSouth's broadband facilities, including facilities serving business customers. As noted earlier, the relevant product market must be defined properly. Cable modem service is primarily a residential service; according to the Commission's most recent figures, fewer than 1% of cable modem subscribers were medium or large businesses or government entities.[24] Conversely, 79.4% of "other wireline" high-speed lines were provided to medium or large businesses or government entities.[25] These lines consist primarily of "traditional telephone company high-speed services and symmetric DSL services . . . ."[26] The same data shows that 58.4% of these "other wireline" lines were provided by BellSouth and other Bell operating companies; another

[23] FTC Guidelines, § 1.51(c).

[24] *High-Speed Services for Internet Access: Status as of June 30, 2003*, Industry Analysis and Technology Division, Wireline Competition Bureau (Dec. 2003) (comparison of Table 1 and Table 3).

[25] *Id.*

[26] *Id.*, Table 1, n. 2.

12.6% were provided by other incumbent LECs.[27] These figures suggest very strongly that most large and medium-sized businesses currently obtain their high speed connections from LECs, including BellSouth. It is thus misleading to point to the cable industry's lead in the combined market as proof of dominance in that combined market, when cable's lead is composed almost entirely of residential subscribers.

BellSouth Has Market Power. It is also mere fantasy to suggest that BellSouth has no market power in the broadband transmission market. It may be possible to define individual market sectors in ways that make BellSouth look like the underdog, but even then such a claim has no basis in reality. Like the other incumbent LECs, BellSouth has a massive base of residential and business subscribers, a well-known and highly regarded trademark, ubiquitous facilities, long-established relationships with state regulatory agencies, enormous financial resources, condemnation authority in at least some jurisdictions, and statutory and franchise rights to provide certain services in the large majority of the territories of nine states. No other company within BellSouth's service area has all of these advantages. Once BellSouth or another incumbent LEC decides to move into a particular market segment for any service, it is immediately a force to be reckoned with, by virtue of these long-standing advantages. BellSouth also conveniently ignores the fact that it holds cable franchises in some jurisdictions, which means that it is essentially competing with itself.

Consequently, while BellSouth may face certain disadvantages by virtue of its status as an incumbent LEC, it remains in a very powerful position in the market. Relieving BellSouth of existing regulatory obligations merely because cable operators may not have the same obligations ignores the many other advantages BellSouth possesses.

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[27] *Id.*, Table 5.

Intermodal Competition Is a Chimera. The hope of "intermodal" competition is also insufficient to justify forbearance. The current marketplace is effectively a duopoly, and it will most likely remain so.[28] Together, the incumbent cable operator and the incumbent LEC will almost certainly dominate the market for broadband services (whether viewed as individual markets or a single, combined one), both nationally and in most defined geographic areas. The large capacity and high reliability of services delivered by wire over networks designed for that purpose – whether cable modem, DSL, or fiber-to-the-home ("FTTH") – will ensure that providers using such technologies will always have an advantage. BellSouth points to broadband-over-powerline ("BPL"), wireless, and satellite technologies as offering intermodal competition, but by Bell South's own admission these technologies currently serve only a relative handful of customers;[29] they are extremely unlikely to produce true competition.

Despite the Commission's hopes for it, BPL is simply not a factor at this stage and it may never be significant. BPL clearly faces technical obstacles, not only with respect to deployment in general, but when compared to the capabilities of cable modem and FTTH. Furthermore, BPL is most likely to succeed in rural areas, where it may be too expensive to deploy FTTH.[30]

Wireless and satellite providers are serving small numbers of subscribers today – but competition from these technologies also remains limited in scope and potential. Capacity and reliability limitations imposed by the nature of the technology remain real. As with BPL, dedicated wireline networks have inherent advantages over over-the-air technologies. In many parts of the country the need for line-of-sight already limits the size of the potential market

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[28] *See, e.g.*, Steven Pearlstein, *Telecom Merger Might Be What Consumers Need*, Wash. Post, Dec. 18, 2004, at E1.

[29] *See* Petition at 10-12.

[30] *Cf. Carrier Current Systems, including Broadband Over Power Line*, Notice of Proposed Rulemaking, ET Docket No. 03-104, ET Docket No. 04-37,19 FCC Rcd 3335 (2004) at ¶ 30.

significantly.[31] As demand for high-bandwidth applications continues to increase, non-wireline providers will always face greater technical challenges than wireline providers. These limitations will not go away. On a regional basis, these technologies may offer alternatives that attract a significant number of consumers. But on a national basis, they do not now and it is unlikely that they ever will.

The Commission Has Not Deregulated Cable Modem Service. Finally, BellSouth ultimately rests its argument on the Commission's tentative findings regarding cable modem service. But the Commission has taken no final action in the *Cable Modem NPRM*, and the facilities of cable operators are not only regulated today, but are likely to remain so even if cable modem service itself is deregulated. The possibility that the Commission might ultimately declare cable modem service entirely unregulated is not sufficient to justify deregulating BellSouth now. Furthermore, notwithstanding BellSouth's assertion that the outcome of *Brand X* will have no bearing on this case, the truth is that nobody knows what the Supreme Court will say and how its decision in *Brand X* might affect the Commission's subsequent decisions. Indeed, should the Supreme Court declare cable modem service to be a telecommunications service, the cable industry may be subject to Title II, making much or all of the Petition moot. It is also possible that the Commission will heed the arguments of local governments and others in the whole range of related proceedings and reconsider its rush towards deregulation. At any rate, the Commission surely would not want to be seen as pre-judging the outcome of any of those proceedings by relying on its tentative findings in one proceeding to decide this one.

[31] *See, e.g., Triennial Review Order* at ¶ 231, n.706.

BellSouth would have the Commission build a national framework for the regulatory treatment of broadband on quicksand. The key "facts" underlying the Petition are actually little more than conjecture and supposition. The Petition should be dismissed for this reason alone.

C. The Statutory Conditions for Forbearance Are Not Met.

It is difficult to address BellSouth's arguments, precisely because they are so general. Where, to take just one example, does the Petition discuss the effects of forbearance on the privacy rights of carriers and customers under Section 222? How do we know that enforcement of that statute is not necessary to protect consumers and is consistent with the public interest if BellSouth does not explain why it is not needed? Despite this difficulty, we will explain why the Petition does not satisfy the three statutory conditions.

1. Enforcement of Computer Inquiry and Title II requirements is necessary to ensure just and reasonable rates and practices.

When viewed in light of the facts rather than BellSouth's conjectures, forbearance is not justified. As discussed above, the most likely scenario for the foreseeable future for most consumers will be a duopoly, consisting of the cable operator and the ILEC. Consumers in some areas may have a broader range of choices, but in most of the country there will be no more than marginal competition from other providers (other than for high-end business customers). Consequently, consumers still need protection from market distortions. Enforcement of existing regulations remains important to prevent unjust or unreasonable charges, practices, classifications, or regulations, as well as unjust or unreasonable discrimination.

At the same time, there is a strong trend toward the migration of services from traditional platforms to broadband networks. The Commission's generally deregulatory policy promotes that migration. Broadband networks offer enormous possibilities, and the Local Government

Coalition supports their growth. But, as discussed in the IP-Enabled Services proceeding,[32] the migration must be managed to protect a whole range of societal interests, many of which are embodied in the very Title II common carriage requirements BellSouth seeks to avoid, and in the concept of common carriage itself. Congress has not directed the Commission to eliminate common carriage, or to promote the development of proprietary networks permitted to favor or exclude particular users.[33]

If the Petition is granted, unregulated broadband networks will offer a wide array of services, while traditional regulated facilities and services are allowed to deteriorate. Narrowband facilities and traditional voice and dial-up services will be seen by consumers as, at best, third-rate options, assuming they survive at all. Should the migration become complete, what choice would consumers have? BellSouth's arguments notwithstanding, consumers would have little choice, because the bulk of communications facilities would be controlled by the cable-ILEC duopoly. A duopoly does not offer meaningful competition.[34] There would be no assurance of reasonable rates on the new networks, because duopolies rarely compete on price. BellSouth asserts that there is already price competition in the broadband market,[35] but price reductions alone are not proof of a fully functioning market. Monopolists lower their prices to

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[32] Comments of NATOA, *et al.*, WC Docket No. 04-36 (filed May 28, 2004) at 20-31.

[33] In fact, in adopting the concept of an open video system, Congress expressly required LECs who choose to provide cable service to make a portion of their systems available to third parties, in a form of common carriage. 47 U.S.C. § 653(B)(1).

[34] *Application for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner, Inc. and America Online, Inc., Petition of AOL Time Warner for Relief from the Condition Restricting Streaming Video AIHS*, Memorandum Opinion and Order, CS Docket No. 00-30, 18 FCC Rcd 16,835 (2003) at ¶ 12; *Amendment of the Commission's Space Station Licensing Rules and Policies*, First Report and Order, 18 FCC Rcd 10760 (2003) at ¶ 64.

[35] BellSouth's evidence seems to consist largely of forecasts by investment analysts. Petition at 19, nn. 75, 74. With all due respect, this is speculation, not fact. Informed speculation, perhaps, but no more.

discourage competition all the time. So do duopolists – but eventually prices come back up. BellSouth has introduced no evidence that says that prices would not come down even further in a truly competitive market. Furthermore, fully functioning markets do more than reduce prices: they also offer meaningful choices in service and promote innovation. To the extent we are seeing innovation today, it is the rush to exploit new technology and establish the first movers' advantage. Once the cable-telco duopoly becomes entrenched, it will stabilize. Prices will also stabilize and consumer choices stagnate.

For the same reasons, there would be no assurance of reasonable quality of service, again because there would be no real competition. If anybody doubts this, one need only consider the cable industry: although DBS offers some form of competition to the cable industry, the public's complaints about cable rates and poor service remain a recurring theme.

Nor would subscribers be free from unreasonable or unjust discrimination under the new regime. The duopolists would be free to set terms of service, without any regulatory oversight, and because a single competitor is not enough to establish meaningful competition, we cannot assume that the market would solve the problem.

Thus, continuing regulation of BellSouth's broadband facilities is necessary, now and in the future. Indeed, as discussed further below, rather than deregulation of BellSouth, the correct policy would be to regulate all operators of broadband facilities at the level of the "facilities" layer. To the extent the Petition is a plea for equity, BellSouth may have a point, depending on the outcome of *Brand X* and other proceedings. But BellSouth has misapprehended the facts and requested the wrong relief.

2. *Enforcement is necessary to protect consumers.*

Enforcement of existing requirements is also necessary to protect consumers, for the same reasons just discussed. Properly functioning markets are effective for protecting the interests of consumers without government intervention, but for a market to function properly there must be meaningful, not partial, competition. There is still no evidence that the market for BellSouth's broadband transmission services or for broadband services more generally is fully-functioning. Mere allegations of competition are not enough, and even in a duopoly BellSouth will face few constraints on its ability to distort the free market. We must therefore presume that some level of regulation is required. Otherwise, consumers could be subjected to unfair billing practices, poor customer service, and other abuses.

3. *Forbearance is not consistent with the public interest.*

As the Local Government Coalition discussed in the IP-Enabled Services proceeding, Title II imposes a number of obligations on incumbent LECs and other telecommunications providers that are vital to the public interest. The Congress established these requirements over the course of many years to address fundamental public policy concerns, and they cannot be ignored. Indeed, it is because these requirements are so fundamental that the Commission should refrain from any further activity in this field without clear, unambiguous authority from Congress.

Among the statutory obligations that BellSouth apparently seeks to avoid are: privacy protection of consumer information (Section 222); ban on obscene telephone calls (Section 223); regulation of pole attachments (Section 224); service for the hearing- and speech-impaired (Section 225); Communications Assistance for Law Enforcement Act compliance (Section 229); on-line child protection requirements (Section 231); universal service (Section 254); and access

by persons with disabilities (Section 255). Presumably other obligations established under Title II, such as 911 service requirements, would also be lifted.

These are all important obligations, established specifically to advance and protect the public interest. At the very least, BellSouth ought to demonstrate that the policy interests Congress sought to protect in establishing each of these requirements would not be harmed if the Petition were granted. We note also that most of these requirements were adopted or significantly amended at the same time as Section 10 was adopted. Thus, any kind of blanket forbearance, as BellSouth has requested, would be singularly inappropriate. Congress never anticipated that the Commission would simply turn around and write all of these provisions out of the Communications Act.

Even if BellSouth's claims of competition were entirely accurate, they would be insufficient to override the harm to the public interest of effectively repealing large portions of Title II.

Section 10 requires that all of the three prerequisites be met before the Commission may forbear.[36] The Petition meets none of them. BellSouth might be able to make the necessary showing for certain specific requirements, but the Petition's all-encompassing approach is insufficient. More importantly, the Commission also needs to develop a coherent regulatory scheme based upon clear, unambiguous Congressional authority, rather than taking a series of uncoordinated steps. Until that time, any kind of forbearance is unjustified.

[36] *Cellular Telecommunications & Internet Ass'n v. FCC*, 330 F.3d 502, 509 (D.C. Cir. 2003).

III. RATHER THAN DEREGULATE BELLSOUTH'S BROADBAND FACILITIES, THE COMMISSION SHOULD REGULATE THE "FACILITIES" LAYER FOR ALL CLASSES OF PROVIDERS.

MCI and others have proposed that the Commission adopt the layers model for determining what activities and entities should be regulated.[37] Under this approach, the Commission would regulate the "physical access" or "facilities" layer. Regulation of the facilities layer is essential to ensure that facilities owners do not discriminate against competitors, or adopt policies that limit consumer choices. In the IP-Enabled Services proceeding, the Local Government Coalition proposed that the Commission adopt regulations consistent with nine principles, including regulation of the facilities layer.[38] While the Local Government Coalition did not specifically call for structural separation, it recognized structural separation as one means of controlling anti-competitive behavior by facilities owners. In this case, the forbearance requested by BellSouth would presumably include the removal of existing structural separation requirements. This is exactly the wrong policy.

We note here that BellSouth Chairman Dwayne Ackerman has recognized the importance of the kinds of public service obligations we seek to preserve. According to a trade press report,

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[37] Comments of MCI, Docket No. 04-36 (filed May 28, 2004), at 9-12.

[38] *See* Reply Comments of NATOA *et al.*, Docket No. 04-36 (filed July 14, 2004). The other eight principles are: the federal government should act to promote technological progress while protecting the rights and interests of all affected parties; service providers should pay fair prices for access to networks; facilities owners should pay fair prices for their use of public property, regardless of their choice of technology; federal law should forbear from economic regulation of service providers in competitive markets; all service providers should be required to contribute towards support for universal service; all providers of voice services should be required to offer E-911 functionality and disability access; the federal government should respect and preserve the police powers of state and local governments; and all facilities-based providers should be required to make capacity available for public use.

Mr. Ackerman recently stated that requirements to assure 911 service, CALEA compliance, and consumer protection are "baseline" and should be enforced on all carriers.[39] We agree.

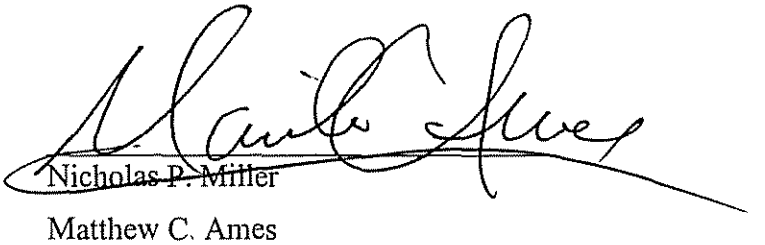
The Coalition therefore urges the Commission to do the opposite of what BellSouth proposes: rather than free BellSouth's broadband facilities of all regulation, the Commission should extend regulation of the facilities layer to all facilities owners. We do not advocate regulation for the sake of regulation. For example, one of the Local Government Coalition's nine principles is that the Commission should forbear from economic regulation of service providers in competitive markets. Nor do we advocate retaining existing regulations purely for their own sake – indeed, it may be sensible to lift or alter some existing requirements as part of a comprehensive approach to protecting both consumers and service providers against anticompetitive behavior by facilities owners. But control over facilities permits too much concentration of power, particularly in a market that remains largely a duopoly, the fiction of intermodal competition notwithstanding. Consequently, some degree of regulation is still required.

[39] *Telecom Reform Should Be Simple, BellSouth CEO Says*, Communications Daily, Dec. 15, 2004, at p. 1.

CONCLUSION

The FCC should deny the Petition and adopt rules that are consistent with the principles proposed by the Local Government Coalition in the IP-Enabled Services proceeding.

Respectfully submitted,



Nicholas P. Miller

Matthew C. Ames
Gerard Lavery Lederer
Miller & Van Eaton, P.L.L.C.
Suite 1000
1155 Connecticut Avenue, N.W.
Washington, D.C. 20036-4306
(202) 785-0600

Attorneys for the Local Government Coalition

December 20, 2004

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